BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 84-1745

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM J. SCHILLING, ETC., PETITIONER

v.

TELEGRAPH SAVINGS AND LOAN ASSOCIATION OF CHICAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
NICHOLAS S. ZEPPOS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

NORMAN H. RAIDEN
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552

QUESTION PRESENTED

The United States will address the following question:

Whether a state statute permitting the former management of a state-chartered savings and loan association placed under the receivership of the Federal Savings and Loan Insurance Corporation to bring an action on behalf of the closed savings and loan conflicts with federal statutes and regulations that place all control over the affairs of the association in the receiver and that bar former management from acting on behalf of the association.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90	11
Brown v. *Hotel Employees*, No. 83-498 (July 2, 1984)	9
Capital Cities Cable, Inc. v. *Crisp*, No. 82-1795 (June 18, 1984)	9
CFTC v. *Weintraub*, No. 84-261 (Apr. 29, 1985)	8
Construction Laborers v. *Curry*, 371 U.S. 542	15
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469	14, 15
Fahey v. *Mallonee*, 332 U.S. 245	11
Fidelity Federal Savings & Loan Ass'n v. *De la Cuesta*, 458 U.S. 141	9
Fidelity Savings & Loan Ass'n v. *Federal Home Loan Bank Board*, 689 F.2d 803, cert. denied, 461 U.S. 914	10, 12
First Savings & Loan Ass'n v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251	8
First Savings & Loan Ass'n v. *First Federal Savings & Loan Ass'n*, 547 F. Supp. 988	8
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132	9
Flynt v. *Ohio*, 451 U.S. 619	15
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555	11
Hines v. *Davidowitz*, 312 U.S. 52	9
Jones v. *Rath Packing Co.*, 430 U.S. 519	8
Manning Savings & Loan Ass'n v. *FSLIC*, No. 83-C-757 (N.D. Ill. Sept. 14, 1983)	8, 16
Market Street R.R. v. *Railroad Comm'n*, 324 U.S. 548	14
McComb v. *Commissioners*, 91 U.S. 1	14

Cases—Continued: Page

Mitchell v. *Forsyth*, No. 84-335 (June 19, 1985) 15
Mora v. *State*, 68 Ill. 2d 223 15
North Mississippi Savings & Loan Ass'n v. *Hudspeth*, 756 F.2d 1096, petition for cert. pending, No. 85-294 ..... 12, 13
O'Dell v. *Espinoza*, 456 U.S. 430 14
Southland Corp. v. *Keating*, 465 U.S. 1 15
Tcherepnin v. *Franz*, 570 F.2d 187, cert. denied, 439 U.S. 876 15
Telegraph Savings & Loan Ass'n v. *Federal Home Loan Bank Board*, cert. denied, 464 U.S. 992 .... 11, 15
Telegraph Savings & Loan Ass'n v. *Schilling*, 703 F.2d 1019, cert. denied, 464 U.S. 992 10

Constitution, statutes and regulations:

U.S. Const. Art. 6, Cl. 2 (Supremacy Clause) 8
Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 *et seq.* 16
§ 122(d), 96 Stat. 1482 16
§ 141(a)(6), 96 Stat. 1489 17
National Housing Act, 12 U.S.C. 1701 *et seq.* 1
12 U.S.C. 1725(a) 9
12 U.S.C. 1729(c) 1
12 U.S.C. 1729(c)(1)(B) 16
12 U.S.C. 1729(c)(1)(B)(ii)(I) 16
12 U.S.C. 1729(c)(2) 5, 16, 17
12 U.S.C. 1729(c)(2)(A)-(C) 1
12 U.S.C. 1729(c)(2)(A)(i) 2
12 U.S.C. 1729(c)(2)(A)(ii) 2, 16
12 U.S.C. 1729(c)(2)(B) 2
12 U.S.C. 1729(c)(2)(C) 2
12 U.S.C. 1729(c)(3)(A) 3
12 U.S.C. 1729(d) 2, 10
12 U.S.C. 1464(d) 3, 7
12 U.S.C. 1464(d)(6)(A) 2, 3, 4, 5, 8, 9, 10, 11, 13, 16
12 U.S.C. 1464(d)(6)(C) 3
12 U.S.C. 1464(d)(6)(D) 2
28 U.S.C. 1257(3) 14

Statutes and regulations—Continued: Page

Fla. Stat. (19—):
Section 665.097(1) 17
Section 665.097(3) 17
Ga. Code § 7-1-150 (1982) 17
Ill. Rev. Stat. ch. 32, § 848 (1970) 4, 5
12 C.F.R.:
Section 563.13 3
Section 569a.4 ..... 2, 3, 7, 10
Section 569a.6(a)-(b) 2
Section 569a.6(a)(3) 2, 7

Miscellaneous:
S. Rep. 1263, 90th Cong., 2d Sess. (1968) 10, 12

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1745

WILLIAM J. SCHILLING, ETC., PETITIONER

v.

TELEGRAPH SAVINGS AND LOAN ASSOCIATION OF CHICAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In the National Housing Act, as amended (12 U.S.C. 1701 *et seq.*), Congress granted to the Federal Home Loan Bank Board (Bank Board) authority to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for state-chartered savings and loan associations. See 12 U.S.C. 1729(c). Section 1729(c)(2)(A)-(C) pre-

scribes three criteria that must be met before the Bank Board may appoint the FSLIC as receiver. First, the savings and loan association must be closed by or under the laws of any state. 12 U.S.C. 1729 (c)(2)(A)(ii).[1] Second, one of the grounds specified in 12 U.S.C. 1464(d)(6)(A) for the appointment of a receiver for a federally-chartered institution must exist (see 12 U.S.C. 1729(c)(2)(B)). And third, an account holder must be unable to make a withdrawal. 12 U.S.C. 1729(c)(2)(C).

Once it has been appointed federal receiver, the FSLIC is given broad authority "to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith * * *." 12 U.S.C. 1729(d); 12 C.F.R. 569a.6(a)-(b); see also 12 U.S.C. 1464(d)(6)(D). Thus, immediately upon taking possession of the association, the FSLIC "by operation of law and without any conveyance or other instrument, act or deed, shall succeed to * * * all the rights, titles, powers, and privileges of the insured institution, its members * * * its officers and directors * * *." 12 C.F.R. 569a.4. These include the power to "[i]nstitute, prosecute, maintain, defend, intervene and otherwise participate in any and all actions, suits, or other legal proceedings by and against the * * * institution * * *, and in every way to represent such institution * * *." 12 C.F.R. 569a.6(a)(3). In turn, after the FSLIC is appointed receiver, "[s]uch mem-

---

[1] If the association is not closed by or under state law, and instead a state receiver is appointed by state officials, the Bank Board must wait fifteen days to appoint the FSLIC as federal receiver. See 12 U.S.C. 1729(c)(2)(A)(i).

bers, * * * officers or directors [of the association] * * * shall not thereafter have or exercise any such rights, powers, or privileges or act in connection with any asset or property of any nature of the institution in receivership." 12 C.F.R. 569a.4.

There is but one statutory exception to these general rules barring former management from taking any action on behalf of the association. Pursuant to 12 U.S.C. 1464(d)(6)(A), former management of an association in receivership may bring an action in United States District Court within 30 days of the appointment of the receiver "for an order requiring the Board to remove such conservator or receiver * * *." Except as specified in Section 1464 (d)(6)(A), however, "no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. 1464 (d)(6)(C).[2]

2. This case arises from the appointment of the FSLIC as federal receiver for respondent Telegraph Savings and Loan Association (Telegraph), a state-chartered savings and loan association. On May 22, 1980, Telegraph was closed under state law by petitioner, the Illinois Commissioner of Savings and Loan Associations. Telegraph had experienced serious financial difficulties for more than a year before it was closed. For example, it failed to meet the reserve and net worth requirements imposed by 12 C.F.R. 563.13 (Pet. App. E2). Telegraph's deteriorating condition

---

[2] Section 1464(d), which generally covers challenges to the appointment of a receiver of a federally chartered savings and loan, is made applicable to state-chartered associations by 12 U.S.C. 1729(c)(3)(A).

became a matter of great concern to federal and state regulatory officials. As a result, throughout 1979 and 1980 representatives of the Bank Board and the FSLIC met repeatedly with petitioner and with Telegraph's board of directors to prevent the institution's failure. Pet. App. E2. Petitioner advised Telegraph that unless its problems were remedied, the state would have to take custody of the association (*ibid.*).

Eventually, all attempts at restoring Telegraph to a stable financial condition collapsed. Petitioner and federal officials therefore concluded that the only alternative was to take control of Telegraph and arrange for its sale (Pet. App. E3). Accordingly, Telegraph's president was notified that petitioner was taking custody of the association, and that because of Telegraph's poor financial condition an "emergency" existed, thus allowing these steps to be taken without prior written notice and an opportunity to correct any deficiencies as provided for by state law (*ibid.*). See Ill. Rev. Stat. ch. 32, § 848 (1970). After determining that the three requirements of 12 U.S.C. 1729(c)(2)(A)-(C) had been met, the Bank Board appointed the FSLIC as receiver for Telegraph. The FSLIC immediately transferred most of Telegraph's assets and liabilities to First Federal Savings and Loan Association pursuant to a purchase and assumption agreement (see Pet. App. E3).

3. Telegraph brought an action under 12 U.S.C. 1464(d)(6)(A) in the United States District Court for the Northern District of Illinois, challenging the Bank Board's appointment of the FSLIC as receiver. Petitioner and the federal agencies were defendants in that action. The district court found that Telegraph was insolvent on May 22, 1980, and held that

the Bank Board had complied with the requirements of 12 U.S.C. 1729(c)(2) in appointing FSLIC as receiver. Pet. App. F1-F26; *id.* at G1-G20. The Seventh Circuit affirmed (Pet. App. E1-E20) and this Court denied Telegraph's petition for a writ of certiorari. 464 U.S. 992 (1983).

In addition to pursuing the remedy provided by Section 1464(d)(6)(A), Telegraph also filed suit against petitioner in state court, alleging that state law was violated when petitioner took custody of the association.[3] Specifically, Telegraph asserted that petitioner failed to give management written notice of the conditions warranting closure and a reasonable time in which to correct these conditions. See Ill. Rev. Stat. ch. 32, § 848 (1970). Telegraph also claimed that there was no "emergency" under state law that warranted dispensing with the required notice and an opportunity to correct. See *ibid.*

The Circuit Court of Cook County, Illinois dismissed Telegraph's claims without opinion. That judgment was reversed by the Appellate Court of Illinois, First Judicial District (Pet. App. C1-C11). The Illinois Supreme Court, by a 4-3 vote, affirmed and ordered the case remanded (Pet. App. B1-B14). The majority concluded that former management, acting on behalf of Telegraph, could assert a state

---

[3] At the time it brought its federal Section 1464(d)(6)(A) action, Telegraph also brought another action against the federal agencies and petitioner in state court. That action was removed to federal court and then dismissed for lack of derivative jurisdiction. See Pet. App. E4. The court of appeals affirmed that ruling. See *id.* at E19-E20. After dismissal of that action Telegraph filed the present case in state court, naming only petitioner as defendant and raising only state law claims.

law claim for damages against petitioner. In so holding, the court rejected petitioner's contention that the action was barred by federal law (Pet. App. B4-B5). The court acknowledged that under the Bank Board's regulations, once FSLIC is appointed receiver, it succeeds to all powers necessary to operate the association, including the power to bring and defend litigation (*id.* at B3-B4). It concluded, nonetheless, that the Bank Board's regulations did not deprive former management of the capacity to bring this action under state law (*id.* at B5). The court also observed that if respondents could not obtain judicial review of petitioner's decision to take custody, serious due process questions would be raised (*ibid.*). Finally, the court held that the federal court judgment adverse to Telegraph did not constitute collateral estoppel in the state court action (*id.* at B5-B8).

DISCUSSION

The Supreme Court of Illinois has incorrectly decided a significant question of federal law. The state court's holding that former management of a state savings and loan placed in federal receivership may assert a cause of action on behalf of the seized association directly conflicts with the governing federal statutes and regulations. If the holding of the Supreme Court of Illinois were to be followed elsewhere, there undoubtedly would be disruption of the receivership functions carried on by FSLIC and the Bank Board. We cannot conclude, however, that the issue warrants an exercise of this Court's certiorari jurisdiction at this time. The decision below appears to be the first appellate ruling on the question presented. Accordingly, the potential adverse impact of the de-

cision may not be realized. In the absence of a conflict among the federal courts of appeals or the state courts, it is our submission that any consideration of the issue by this Court could profitably await further exploration by lower tribunals.

1. The holding of the Supreme Court of Illinois is flatly inconsistent with the governing statute and the regulations promulgated by the Bank Board. Under the applicable federal law, once a savings and loan is placed under FSLIC receivership, former management loses all authority to act on behalf of the association. Rather, 12 U.S.C. 1729(d) invests FSLIC, as receiver, with the powers

> to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the [Bank Board] * * *.

The Bank Board has, by regulation, identified specific components of FSLIC's authority as receiver. Thus, FSLIC is empowered to (12 C.F.R. 569a.6(a)(3)):

> [i]nstitute, prosecute, maintain, defend, intervene and otherwise participate in any and all actions, suits, or other legal proceedings by and against the Receiver or such institution or in which the Receiver, such institution, or its creditors or members, or any of them, shall have an interest, and in every way to represent such institution, its members and creditors.

The regulations also specifically provide that upon the appointment of FSLIC as receiver, former management is prohibited from taking any action on behalf of the closed association (12 C.F.R. 569a.4):

> Such members, holders of checking or savings accounts and non-withdrawable accounts, officers or directors, or any of them, or any such conservator, [state-appointed] receiver, or other legal custodian shall not * * * have or exercise any such rights, powers, or privileges or act in connection with any asset or property of any nature of the institution in receivership.

As part of this general divestment of authority to act for the association, former management no longer has the capacity to initiate litigation on the association's behalf. See *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 547 F. Supp. 988, 994 (D. Haw. 1982); *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251, 255 (D. Haw. 1981); *Manning Savings & Loan Ass'n* v. *FSLIC*, No. 83-C-757 (N.D. Ill. Sept. 14, 1983), slip op. 4-5 (Pet. App. H5-H6); cf. *CFTC* v. *Weintraub*, No. 84-261 (Apr. 29, 1985).

The statute provides only one exception to this overarching rule. Pursuant to 12 U.S.C. 1464(d)(6)(A), former management may challenge the appointment of the federal receiver by filing an action in district court within 30 days of the Bank Board's appointment. Aside from this statutorily-prescribed exception, former management may not bring any other cause of action on the association's behalf. See *First Savings & Loan Ass'n*, 547 F. Supp. at 994; *First Savings & Loan Ass'n*, 531 F. Supp. at 255; *Manning Savings & Loan Ass'n*, slip op. 6-7 (Pet. App. H5-H6).

2. Under the Supremacy Clause, state law that conflicts with valid federal law is preempted. This occurs where Congress has expressly preempted state law (see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977)) and where, absent an explicit statement

of federal supremacy, an actual conflict between state and federal law makes "compliance with both * * * regulations * * * a physical impossibility" (*Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963)), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); see also *Brown* v. *Hotel Employees*, No. 83-498 (July 2, 1984), slip op. 9. In gauging the extent of such a conflict, courts are to regard federal regulations adopted by an administrative agency as having the same preemptive effect as federal statutes. See *Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795 (June 18, 1984), slip op. 6; *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153-154 (1982).

The holding below is directly at odds with the governing federal statutes and regulations. Respondents unsuccessfully pursued their action in federal district court to remove the receiver under Section 1464(d)(6)(A). Once they failed in that action, under the Bank Board's regulations they had no right to sue on behalf of the association in either federal or state court on any cause of action. There is no suggestion, by either respondents or the court below, that the Bank Board's regulations are invalid; nor could the regulations seriously be questioned since they fall squarely within the scope of the broad rulemaking authority expressly conferred by Congress. See 12 U.S.C. 1725(a); cf. *De la Cuesta*, 458 U.S. at 160-161. Thus, insofar as the Supreme Court of Illinois has interpreted state law to authorize former management to sue on behalf of the association, state law conflicts with valid federal regulations and therefore is preempted. See *Capital Cities Cable, Inc.* v. *Crisp*, slip op. 5-6; *De la Cuesta*, 458 U.S. at 153-154.

3. Although the Supreme Court of Illinois acknowledged that the Bank Board's regulations generally bar former management from asserting rights on behalf of an association in federal receivership, it nonetheless found the regulations not controlling for two reasons. Neither reason can withstand scrutiny.

First, the court explained (Pet. App. B4-B5) that the Bank Board's regulations were inapplicable because this action was simply the state law analogue to a federal action under 12 U.S.C. 1464(d)(6)(A) to remove the FSLIC as the receiver. Because the latter was not barred by the Bank Board's regulations, the court concluded that the former was similarly not barred. The court's reasoning overlooks the fundamental point that a Section 1464(d)(6)(A) lawsuit is an expressly authorized exception to the general powers granted the FSLIC as receiver in 12 U.S.C. 1729(d). There are no other exceptions stated in the Act or the Bank Board's regulations, nor can the regulations be read to permit any other exceptions. 12 C.F.R. 569a.4 (except for an action under Section 1464(d)(6)(A), former management "shall not * * * exercise any * * * rights, powers, or privileges or act in connection with any asset or property of any nature of the institution in receivership").[4]

---

[4] In addition, the court's attempt to analogize the state law claim to an action under Section 1464(d)(6)(A) injects state law into the matter when it is clear that Congress assumed that upon the appointment of the federal receiver only federal law would be relevant. See *Telegraph Savings & Loan Ass'n* v. *Schilling*, 703 F.2d 1019, 1024, cert. denied, 464 U.S. 992 (1983) (Pet. App. E7-E8); *Fidelity Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, 689 F.2d 803, 811 n.13 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983); S. Rep. 1263, 90th Cong., 2d Sess. 10-11 (1968).

The Bank Board interprets this regulation in accordance with its plain meaning: former management is precluded from bringing this cause of action. This reading by the agency which promulgated the regulations and administers them is due "a high degree of deference." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 557 (1980). As was noted in *Milhollin*, 444 U.S. at 568, "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." Thus, the Illinois court was incorrect in concluding that the Bank Board's regulations did not bar this lawsuit.

The second reason offered by the court for permitting this action was its belief that if former management were barred from challenging the actions of the state commissioner, serious due process concerns would arise. This conclusion is incorrect. As we discussed in our brief in opposition (at 8-9) in *Telegraph Savings & Loan Ass'n* v. *Schilling*, cert. denied, 464 U.S. 992 (1983), the judicial proceeding under 12 U.S.C. 1464(d)(6)(A) provided Telegraph with a full and fair hearing for challenging the governmental actions. In *Fahey* v. *Mallonee*, 332 U.S. 245 (1947), this Court upheld against a due process challenge a statutory scheme quite similar to that at issue here. The same analysis compels the conclusion that the federal court action provided Telegraph all the process it was due. Surely, Telegraph was not entitled to two judicial proceedings to challenge the actions taken against it by government officials. Cf. *Allen* v. *McCurry*, 449 U.S. 90, 104 (1980).

4. In seeking to fashion an implied exception to the Bank Board's regulations, respondents' approach threatens to disrupt substantially the orderly and prompt process of liquidation Congress intended.

Prior to 1968 the Bank Board had no authority to appoint the FSLIC as receiver for a state-chartered institution. See *Fidelity Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, 689 F.2d 803, 811-812 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983); S. Rep. 1263, 90th Cong., 2d Sess. 6-7, 9-10 (1968). FSLIC could act as the receiver of a state-chartered savings and loan only if appointed by the responsible *state* officials. See *ibid.* Often state officials refused to appoint the FSLIC as receiver or did so after undue delay, resulting in substantial losses for the FSLIC insurance fund as well as for the savings and loan association itself. See *id.* at 7. In 1968 Congress acted to cure these problems. The Bank Protection Act of 1968 specifically empowers the Bank Board to appoint the FSLIC as receiver for federally-insured, state-chartered associations experiencing financial distress. See *id.* at 10-11. In granting this authority, Congress's overriding concern was to allow the Board to carry out its receivership functions expeditiously and without undue interference. See *ibid.*; *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1101 (5th Cir. 1985), petition for cert. pending, No. 85-294; *Fidelity Savings & Loan Ass'n*, 689 F.2d at 811-813. As the Senate Report explained, "if the ability of the FSLIC to meet its insurance commitments is ever called into question, there would be grounds for serious public concern." S. Rep. 1263, 90th Cong., 2d Sess. 6 (1968).[5] To ef-

[5] The Senate Report added that (S. Rep. 1263, *supra*, at 7)

> In most receivership cases, upward of 95 percent of an association's liabilities are to the FSLIC. Thus, the FSLIC has a vital stake in the proper management and disposal of the assets of an association in receivership.

Congress was well aware that (*id.* at 8) "[t]he reserves of the FSLIC are not unlimited and cannot stand an indefinite repetition of unrecovered receiverships."

fectuate this purpose, the statute provides that, except for the action authorized by Section 1464(d)(6)(A), "no court may * * * restrain or affect the exercise of powers or functions of a * * * receiver." 12 U.S.C. 1464(d)(6)(C).

The result reached by the Supreme Court of Illinois, and the position urged by respondents, directly conflict with these statutory goals. Under respondents' approach, there is no reason why numerous other actions could not be brought in both federal and state court by former management on behalf of the association. Obviously, the necessary judicial determinations of such claims would result in substantial delays in the process of liquidation. This would fragment and protract the liquidation process rather than concentrate all authority in the Bank Board and FSLIC as the statutes and regulations contemplate. That result cannot be squared with Congress's concerns that the Bank Board be able to act "quickly and decisively in reorganizing, operating, or dissolving a failed institution * * *." *North Mississippi Savings & Loan*, 756 F.2d at 1101.

A further concern with the opinion below is its potential for discouraging state authorities from cooperating with the Bank Board in resolving the problems of financially troubled institutions.[6] Rather than pursue prompt remedial steps to preserve public confidence, state officials could be deterred, or at least delayed, by the concern that decisive action might invite liability. While we are confident that state banking authorities will strive to discharge their re-

---

[6] The Bank Board advises us that, from 1980 through August 1985, it has appointed FSLIC as receiver for 71 failed associations, 54 of which (or 76%) were state-chartered. As these figures indicate, the bulk of FSLIC's losses arise from failures of state-chartered institutions.

sponsibilities properly, the difficult tasks they confront should not be complicated by the possibility of state law sanctions for pursuing Congress's stated goals.

5. For all the flaws in the state court's analysis, we do not believe this case meets the usual standards for exercise of certiorari jurisdiction. There is no conflict between the circuits or state courts over the issues presented. In fact, to our knowledge the decision of the Supreme Court of Illinois is the only appellate ruling on the question whether former management may bring a damage action against state officials on behalf of the association after the appointment of a federal receiver. While, as noted above, this decision has a potential to disrupt the smooth working of the federal regulatory scheme, that concern remains somewhat speculative. The decision below affects but one state and, unless the incorrect holding is followed elsewhere, the impact will be contained.

An additional factor weighing against review is that the state court's decision is interlocutory.[7] The

---

[7] The interlocutory posture of the case poses a question of this Court's jurisdiction. Petitioner asserts jurisdiction under 28 U.S.C. 1257(3), but this Court's jurisdiction under Section 1257 extends only to final judgments or decrees. *O'Dell* v. *Espinoza*, 456 U.S. 430 (1982); *Market Street R.R.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945). The state court's decision that the complaint alleges a cause of action does not constitute a final judgment. See *McComb* v. *Commissioners*, 91 U.S. 1, 2 (1875).

Further review is not necessarily precluded, however. This Court has identified certain categories of cases in which finality exists as to the federal issue despite the pendency of further proceedings in the lower state courts. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-483 (1975). This

Illinois Supreme Court held only that respondents have a cause of action and remanded the case for further proceedings (Pet. App. B11). It may well be that petitioner will prevail at trial or on appeal in the state courts from a final judgment.[8] It is also possible that in subsequent proceedings the state courts will define the cause of action in a way that discourages or minimizes any disruption of the federal regulatory scheme. On the other hand, should respondents ultimately prevail, this Court could reconsider at that time whether further review is warranted.

Finally, review is unwarranted because as respondents point out (Br. in Opp. 15-16), and as we discussed in our brief in opposition (at 9-10) in *Telegraph Savings and Loan Ass'n* v. *Schilling*, *supra*, it is uncertain whether the issues of federal law presented in this case will arise again in this factual

---

case arguably falls within the fourth category described in *Cox Broadcasting*, 420 U.S. at 482-483, *i.e.*, cases where the federal questions are finally resolved and the party seeking review could prevail in state court on non-federal grounds but reversal on the federal issue would be "preclusive of any further litigation." While this Court has recognized that this exception must be applied with caution (*Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981)), an argument can be made that the further prosecution of this case would "seriously erode federal policy" (420 U.S. at 483) to a degree sufficient to warrant immediate review. *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984); *Construction Laborers* v. *Curry*, 371 U.S. 542, 548 (1963); cf. *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985).

[8] In addition, petitioner may prevail on a dispositive motion asserting immunity against suits for damages. See *Mora* v. *State*, 68 Ill. 2d 223, 234 (1977); *Tcherepnin* v. *Franz*, 570 F.2d 187, 191 (7th Cir.), cert. denied, 439 U.S. 876 (1978).

context. The action by the Bank Board and petitioner were taken pursuant to 12 U.S.C. 1729(c)(2), which permits the Bank Board to appoint the FSLIC as receiver only after the responsible state official has closed the institution. See 12 U.S.C. 1729(c)(2)(A)(ii). In the Garn-St Germain Depository Institutions Act of 1982 (Pub. L. No. 97-320, 96 Stat. 1469 *et seq.*), Congress expanded the Bank Board's authority to appoint a receiver for state-chartered savings and loans. Under Section 122(d) of the Act (96 Stat. 1482; 12 U.S.C. 1729(c)(1)(B)), the Bank Board may appoint a receiver for a state-chartered savings and loan even absent a closing of the institution under state law, if the responsible state official gives written approval. 12 U.S.C. 1729(c)(1)(B)(ii)(I). Contrary to respondents' suggestion (Br. in Opp. 15), the enactment of this new statute does not mean that the issues presented in this case can no longer arise. Presumably, under the decision below state officials would be subject to suit by former management for giving written approval under the Garn-St Germain Act. See *Manning Savings & Loan Ass'n* v. *FSLIC*, No. 83-C-757 (N.D. Ill. Sept. 14, 1983) (Pet. App. H1) (dismissing state law damages claim against state official for giving written approval under Garn-St Germain Act to Bank Board's appointment of a receiver on the basis that former management may not assert rights of the association except for action under 12 U.S.C. 1464(d)(6)(A)). But the precise questions that would be generated remain for the future and for this Court's consideration should such cases arise.[9]

---

[9] The authority granted the Bank Board in the Garn-St Germain Act had a sunset provision of October 15, 1985. See

CONCLUSION

The petition for a writ of certiorari should be denied with respect to the first question presented.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
NICHOLAS S. ZEPPOS
Attorneys

NORMAN H. RAIDEN
General Counsel
Federal Home Loan Bank Board

NOVEMBER 1985

Pub. L. No. 97-320, § 141(a)(6), 96 Stat. 1489. That provision has now been extended to April 15, 1986. Pub. L. No. 99-120. It is not clear precisely what the Bank Board's authority will be after that date, as further legislation is awaited. Thus, we cannot predict whether, or in what form, the issues presented here will reoccur in future cases where the Bank Board appoints a receiver under Section 1729(c)(2). Our review indicates that other states have statutes similar to the Illinois statute here. See, *e.g.*, Fla. Stat. § 665.097(1) and (3) (1984); Ga. Code § 7-1-150 (1982). There is, accordingly, some potential for future litigation.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20065